TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 5 | Number 2 Article 5

1989

Postpartum Psychosis as a Defense to Infant Murder

Barbara E. Rosenberg

POSTPARTUM PSYCHOSIS AS A DEFENSE TO INFANT MURDER

INTRODUCTION

Criminal liability is based upon the requirements that a defendant acted voluntarily[1] and possessed the requisite criminal intent.[2] Various defenses, such as the insanity defense,[3] may limit liability when a person's acts, because of mental illness,[4] are not manifestations of free will.[5]

Postpartum psychosis,[6] a psycho-medical disorder peculiar to

---

1. *See* MODEL PENAL CODE § 2.01(1), 10 U.L.A. 464 (1974). "A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act . . . of which he is physically capable." *Id.* There can be no criminal responsibility for acts committed while unconscious, *see id.* § 2.01(2)(b); while involuntarily intoxicated, *see, e.g.*, People v. Carlo, 46 A.D.2d 764, 361 N.Y.S.2d 168 (1st Dep't. 1974); while hypnotized, *see, e.g.*, MODEL PENAL CODE § 2.01(2)(c); or during an epileptic episode, *see, e.g.*, Oborn v. State, 143 Wis. 249, 126 N.W. 737 (1910).

2. MODEL PENAL CODE § 2.02(1). The Model Penal Code sets forth *mens rea*, or criminal intent, as a minimum requirement of culpability. "[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." *Id.; see also* N.Y. PENAL LAW § 15.05 (McKinney 1987 & Supp. 1989) (culpable mental states require conscious intent, knowledge, or disregard of a substantial risk).

3. "The insanity defense refers to that branch of the concept of insanity which defines the extent to which men accused of crime may be relieved of criminal responsibility by virtue of mental disease." A. GOLDSTEIN, THE INSANITY DEFENSE 9 (1967).

4. [A] mental disorder is conceptualized as a clinically significant behavioral or psychologic syndrome or pattern that occurs in an individual and that typically is associated with either a painful symptom (distress) or impairment in one or more important areas of functioning (disability). In addition, there is an inference that there is a behavioral, psychologic, or biologic dysfunction, and that the disturbance is not only in the relationship between the individual and society. When the disturbance is limited to a conflict between an individual and society, this may represent social deviance, which may or may not be commendable, but is not by itself a mental disorder.

AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 363 (3d ed. 1980) [hereinafter DSM III].

5. 2 P. ROBINSON, CRIMINAL LAW DEFENSES § 171(a) (1984).

6. Postpartum depression, sometimes referred to as "baby blues," is a common condition which usually appears and disappears within twenty-four hours after delivery. R. BERKOW & A.J. FLETCHER, THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1788-89 (15th ed. 1987) [hereinafter MERCK]. The condition is marked by a wide variety of physical and psychological ailments which may occur with varying degrees of severity. *A California Doctor Delivers Good News to New Moms With Postpartum Blues: It's Curable*, PEOPLE WEEKLY, Dec. 15, 1986, at 105-06 [hereinafter *Postpartum Blues*].

women, has been asserted as a defense to infanticide,[7] but has met with varying degrees of success.[8] While England has statutorily recognized this syndrome for over sixty years,[9] there is no United States counterpart.[10] In the eighteen instances where women have asserted the defense in this country, only half were found not guilty by reason of insanity.[11]

This Comment examines the use of postpartum psychosis as a defense to infant murder and reviews recent conflicting cases in the United States. Part I establishes the condition as a hormonal disorder recognized by the American Psychiatric Association, gynecologists, and obstetricians. It traces the history of infanticide in England and the United States and analyzes postpartum psychosis under the several insanity defenses utilized in different jurisdictions. Part II discusses applications of the postpartum defense in United States cases. Part III suggests solutions to the societal problem arising from this condition including the use of this mental disorder as a separate statutory affirmative defense to criminal liability.

I. BACKGROUND

A. Postpartum Psychosis Defined

Following childbirth, hormone production sharply decreases and severe glandular changes occur.[12] This may be followed by a period

---

In its mildest form, symptoms may include anxiety, confusion, tearfulness, and insomnia lasting from twenty-four to seventy-two hours. *Id.* A more severe form may include physical symptoms and may last for months or even years. *Id.* The symptoms include "headaches, constipation, tremors, episodes of palpitations, sweating and diminished sexual response." *Id.* The most severe form manifests as a psychosis, causing the new mother to experience "suicidal or homicidal thoughts, hallucinations or psychotic behavior." MERCK, *supra*, at 1788.

7. In this Comment, infanticide means the killing of a child under one year old, consistent with England's Infanticide Act, 1938, 1 & 2 Geo. 6, ch. 36, § 1(I), *reprinted in* 8 HALSBURY'S STATUTES OF ENGLAND 334 (3d ed. 1969); *see infra* notes 9, 57-60 and accompanying text.

8. *See* Cox, *Postpartum Defense: No Sure Thing*, NAT'L L.J., Dec. 5, 1988, at 3, 24; Toufexis, *Why Mothers Kill Their Babies*, TIME, June 20, 1988, at 81, 83; *see also infra* notes 78-117 and accompanying text.

9. The Infanticide Act, 1938, 1 & 2 Geo. 6, ch. 36, § 1(I), *reprinted in* 8 HALSBURY'S STATUTES OF ENGLAND 334 (3d ed. 1969) (expressly recognizing that a woman may commit infanticide because "the balance of her mind was disturbed" by childbirth or lactation).

10. R. WEIR, SELECTIVE NONTREATMENT OF HANDICAPPED NEWBORNS 5 (1984).

11. Cox, *supra* note 8, at 24.

12. A. KREUTNER, ADOLESCENT OBSTETRICS & GYNECOLOGY 185 (1978). "With the loss of the placenta there is an immediate withdrawal of peptide hormones and steroids. An impressive diuresis occurs and symptoms of heaviness, bloating and epigastric distress are suddenly gone." *Id.* During this time, hypothalmic, pituitary, thyroid, ovarian and adrenal gland changes are experienced by the mother. Prolactin, LH, and FSH increase. *Id.*

of "baby blues," depression characterized by tearfulness and sadness.[13] Seventy to eighty percent of women suffer this transient depression which may vanish within a day.[14]

The puerperal period[15] must be watched closely since the postpartum depression may have more significant implications.[16] If the patient with mild depression displays no tearfulness or loses interest in the baby, a problem more serious than "baby blues" may exist.[17] About eight to twelve percent of women who give birth experience more severe depression which may last for months.[18] These women typically experience drastic mood swings, loss of appetite, and insomnia.[19] They may be plagued by invasive and terrifying thoughts of suicide or killing their babies.[20] Fantasies of dropping the child down the stairs, burying it in the backyard, or cutting it up with a kitchen knife are not uncommon.[21]

If these suicidal or homicidal thoughts are accompanied by hallucinations or psychotic behavior,[22] then the condition has progressed to depressive psychosis and must be "vigorously treated."[23] Though less than one percent of women become psychotic,[24] the frequency of severe cases is significant. It is estimated that one in every 1,000

---

13. S. ALADJEM, OBSTETRICAL PRACTICE 414 (1980). Postpartum depression is usually accompanied by irritability, crying, loss of sleep, and loss of appetite. *Id.* After lactation, the depression usually disappears. A. KREUTNER, *supra* note 12, at 185.

14. D. DANFORTH, OBSTETRICS & GYNECOLOGY 765 (1986).

15. The puerperal period refers to the time during which, and shortly after, a woman gives birth. W. DORLAND, MEDICAL DICTIONARY 526 (21st ed. 1968).

16. D. DANFORTH, *supra* note 14, at 765. "Between the simple, virtually physiologic, mild third day depression and the true psychoses there is a gamut of neuroses that can occur in the puerperium. Some are trivial and self-limited and do not require special care; in others, the patient is greatly benefited by referral to a psychiatrist." *Id.*

17. *Id.* A physician can determine whether the patient is in need of psychiatric help by evaluating "whether the neurotic manifestations are of sufficient magnitude to interfere with the patient's effectiveness and her ability to cope with the ordinary day-to-day tasks and activities with which she is faced." *Id.*

18. Toufexis, *supra* note 8, at 81.

19. *Id.*

20. *Id.*

21. *Id.* Psychiatrist Ricardo Fernandez of Princeton, New Jersey, reports that these postpartum women experience a "tremendous amount of guilt and shame because of these thoughts." *Id.*

22. S. ALADJEM, *supra* note 13, at 424. "Direct evidence of psychotic behavior is the presence of either delusions or hallucinations without insight into their pathological nature. The term psychotic does not apply to minor distortions of reality that involve matters of relative judgment." DSM III, *supra* note 4, at 367.

23. A. KREUTNER, *supra* note 12, at 185-86. "These patients may become very quiet and mute or experience a manic phase. Sleep disturbances, unwillingness to eat, suicidal wishes and inability to function result in psychiatric hospitalization." *Id.*

24. Toufexis, *supra* note 8, at 81.

births, or 3,000 births yearly, results in severe postpartum reactions.[25] The condition may be treated successfully by the use of antipsychotic drugs and psychiatric treatment, although, in some cases, more extreme methods are necessary.[26] The mother may need hospitalization and/or electroshock therapy to treat her psychosis and to avert potential suicide or homicide.[27] Absent successful treatment, the consequences of postpartum psychosis can be shocking.[28]

In one tragic example, a mother drowned her nine-month-old baby after hallucinating that the voice of God told her that her son was the devil.[29] She later explained her mental state: "I thought if I killed the baby that my husband would raise him to life again in three days and that the world would know that my husband was Jesus Christ . . . . When he was dead, I thought his face was contorted like the devil's."[30] This woman had previously hallucinated

---

25. *Postpartum Blues, supra* note 6, at 105-06.

26. ALADJEM, *supra* note 13, at 424. Antipsychotics such as phenothiazines, chlorpromazine (Thorazine), and thioridazine (Mellaril) may be prescribed. The treatment should alleviate the mother's insomnia and inability to eat. If she has not shown general improvement by the fourth week of medication, a psychiatrist or physician should be consulted. *Id.*

> [W]ith treatment - and sometimes without it - a . . . dissociative process will suddenly clear, the patient will feel well, will have little or no recollection of her psychosis, and will never again have a recurrence. While not unheard of in nonpuerperal schizophrenia, it is much less common than in postpartum dissociative syndromes.

Commonwealth v. Comitz, 365 Pa. Super. 599, 611, 530 A.2d 473, 479 (1987) (quoting J. HAMILTON, POSTPARTUM PSYCHIATRIC PROBLEMS, 67-68 (1962)).

27. ALADJEM, *supra* note 13, at 424.

28. Much can be done, however, if the risk of postpartum psychosis is recognized and treatment is made available. A simple questionnaire has been developed for screening women at risk. R. PITKIN, 1980 YEARBOOK OF OBSTETRICS AND GYNECOLOGY 220 (1980). The development of postpartum psychosis in a particular woman can now be predicted through elaborate psychological tests. *Id.* at 219-20. After birth, a physician can simply inquire of the new mother whether she is having thoughts or feelings of harming herself or her baby. S. ALADJEM, *supra* note 13, at 424. Questioning the mother will not cause her to act on these thoughts. On the contrary, the patient will be relieved to know that her doctor cares and can offer assistance. *Id.*

A study of over 100 women has identified factors which put women at risk. Mintzer, *Ready for the Blues*, HEALTH, Apr. 1987, at 14. The factors include: age (under 20); single or separated; little parental support; economic problems; and a prior history of depression or emotional illness. *Id.* A "take-home" quiz has been developed for women to use on their own in determining whether they might be at risk. *Id.* If a woman has reason to believe she is at risk, she can seek therapy during her pregnancy and medical treatment after her delivery.

29. Toufexis, *supra* note 8, at 81. She spent several months in a mental hospital after asserting the postpartum defense to a judge. Cox, *supra* note 8, at 24; *see also infra* notes 78-81 and accompanying text.

30. Toufexis, *supra* note 8, at 81.

after the birth of her first child and jumped off a bridge as a result.[31] She survived, but her second child did not.[32]

Postpartum psychosis, like all psychoses, is a mental disorder in which impairment of mental functioning progresses to a degree that grossly interferes with cognitive abilities.[33] The psychosis may also impair the ability to meet ordinary demands of life or to maintain adequate contact with reality.[34] Yet, postpartum mental disorders remain poorly understood.[35] Psychiatric debate centers on whether these disorders are distinct forms of depression or psychosis.[36] In fact, the *Diagnostic and Statistical Manual of Mental Disorders III (DSM III)*,[37] the most recent and respected classification system in psychiatry, classifies the illness as an atypical psychosis, that is, a psychotic disorder in which there are psychotic symptoms which do not meet all of the criteria for any specific mental disorder.[38] Symptoms may include delusions,[39] hallucinations,[40] incoherence,[41] loosening of associations,[42] markedly illogical thinking,[43] or behavior that is grossly disorganized or catatonic.[44]

---

31. *Id.* When pregnant with her second child, Thompson's doctor told her, "Take it easy. I see no reason why it should happen again." *Id.*

32. *Id.* at 83.

33. DSM III, *supra* note 4, at 410.

34. *Id.*

35. Toufexis, *supra* note 8, at 81.

36. *Id.*

37. DSM III, *supra* note 4.

38. *Id.* at 202-03. Included in the category of atypical psychoses are "'[p]ostpartum psychoses' that do not meet the criteria for an Organic Mental Disorder, Schizophreniform Disorder, Paranoid Disorder, or Affective Disorder." *Id.* at 203.

39. DSM III defines a delusion as "[a] false personal belief based on incorrect inference about external reality and firmly sustained in spite of . . . what constitutes incontrovertible and obvious proof or evidence to the contrary." *Id.* at 356.

40. A hallucination is "[a] sensory perception without external stimulation of the relevant sensory organ." *Id.* at 359.

41. Incoherence is "[s]peech that, for the most part, is not understandable, owing to any of the following: a lack of logical or meaningful connection between words, phrases, or sentences; excessive use of incomplete sentences; excessive irrelevancies or abrupt changes in subject matter; idiosyncratic word usage; distorted grammar." *Id.* at 362.

42. Loosening of associations is "[t]hinking characterized by speech in which ideas shift from one subject to another that is completely unrelated or only obliquely related without the speaker's showing any awareness that the topics are unconnected." *Id.*

43. Illogical thinking is "[t]hinking that contains clear internal contradictions or in which conclusions are reached that are clearly erroneous, given the initial premises." *Id.* at 361.

44. Catatonic behavior is characterized as "[m]arked motor anomalies, generally limited to disturbances in the context of a diagnosis of a non-organic psychotic disorder." *Id.* at 354.

Postpartum psychosis may also come under the headings of Organic Mental Disorder,[45] Schizophreniform Disorder,[46] Paranoid Disorder,[47] or Affective Disorder,[48] depending on the symptoms suffered by the mother. Although psychiatrists have not determined precisely the illness' cause or classification, those afflicted clearly suffer from a temporary mental illness and therefore should be treated, medically and legally, according to traditional notions of fairness and justice.

B. The History of Infanticide

The term infanticide has traditionally meant the intentional killing of young children ranging in age from newborn to just under the "age of discretion."[49] Various motivations may precipitate infant murder, including economic reasons,[50] social customs and pressures,[51] or abnormality of the infant.[52] Since the Enlightenment, infanticide has been regarded as an illegal act in England.[53] Britain's

---

45. "[O]rganic mental disorder designates a particular organic brain syndrome in which the etiology is known or presumed (e.g., Alchohol Withdrawal Delirium, Multi-infarct Dementia)." *Id.* at 101.

46. "The essential features [of Schizophreniform Disorder] are identical with those of Schizophrenia with the exception that the duration, including prodromal, active and residual phases, is less than six months but more than two weeks." *Id.* at 199.

47. "The essential features of [Paranoid Disorders] are persistent persecutory delusions or delusional jealousy, not due to any other mental disorder . . . ." *Id.* at 195.

48. "The essential feature of [an Affective Disorder] is a disturbance of mood, accompanied by a full or partial manic or depressive syndrome that is not due to any other physical or mental disorder." *Id.* at 205.

49. R. WEIR, *supra* note 10, at 4.

50. *Id.* at 17. Poverty has often been a reason for infanticide, particularly when the family is already large or one or both parents are unemployed. An impoverished mother may decide that destroying the child is necessary for the family's survival. *Id.*

51. *Id.* at 18. Traditional societies may prescribe the number of children in a family or the maximum number of male or female children that is acceptable. *Id.*

52. *Id.*

> Expecting a normal infant to appear at birth, mothers . . . have recoiled at the sight of infants with physical deformities. In earlier historical periods, congenital defects were interpreted as works of the devil, portents of coming events, signs of fate, punishment for the sins of . . . parents, or tricks played by witches.

Id. at 18-19.

53. An act to prevent the destroying and murdering of bastard children, 1624, 21 Jac. 1, ch. 27, *reprinted in* P. HOFFER & N.E.H. HULL, MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558-1803, 20 (1981) was repealed and replaced by The Ellenborough Act, 1803, 43 Geo. 3, ch. 58, *reprinted in* 44 PICKERING'S STATUTES AT LARGE 203 (1804) (making prosecution for infanticide more difficult). Throughout the century, several infanticide laws were passed. R. WEIR, *supra* note 10, at 15. In 1938, the most recent statute was enacted, The Infanticide Act, 1938, 1 & 2 Geo. 6, ch. 36, *reprinted in* 8 HALSBURY'S STATUTES OF ENGLAND 334 (3d ed. 1968) (repealing, and re-enacting with modifications, The Infanticide Act of 1922).

efforts to curtail infanticide and define the proper scope of punishment involved enacting laws prohibiting it and establishing penalties for persons convicted of such acts. As early as 1624, Parliament enacted a law recognizing infanticide as murder which was punishable by death.[54] However, the law enabled mothers of "good reputation" who killed their infants to be acquitted on the ground of temporary insanity because they appeared to have no other motive.[55] The Act created novel temporary insanity pleas including the "benefit-of-linen" defense: "if the mother had made linen for her infant before its birth, she could establish either the accidental nature of the infant's death or her own insanity while killing it."[56]

England's most recent codification, The Infanticide Act of 1938,[57] provides in part:

> Where a woman by any wilful act or omission causes the death of her child . . . under the age of twelve months, but at the time of the act . . . the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding [the fact that] . . . the offence would have amounted to murder, she shall be guilty of . . . infanticide . . . .[58]

The Act provides for the jury to return a verdict of manslaughter or not guilty by reason of insanity,[59] resulting in probation and treatment, not imprisonment.[60] Thus, historically, British law has been

---

54. 21 Jac. I, ch. 27 (1624), *reprinted in* P. HOFFER & N.E.H. HULL, *supra* note 53, at 20. The Act imposed the death penalty on any woman found guilty of killing a bastard infant. The Act provides in part:

> Whereas, many lewd women that have been delivered of bastard children, to avoid their shame, and to escape punishment, do secretly bury or conceal the death of their children . . . be it enacted by the authority of this present parliament, [t]hat if any woman . . . be delivered of any issue of her body male or female, which being born alive, should by the laws of this realm be a bastard, and that she endeavor privately either by drowning or secret burying thereof . . . the said mother so offending shall suffer death as in the case of [murder].

Id.

55. R. WEIR, *supra* note 10, at 14.

56. *Id.* (footnote omitted).

57. The Infanticide Act, 1938, 1 & 2 Geo. 6, ch. 36, *reprinted in* 8 HALSBURY'S STATUTES OF ENGLAND 334 (3d ed. 1968).

58. *Id.* Section 1(I) "Wilfully" means deliberately and intentionally, "so that the mind of the person who does the act goes with it." *Id.*

59. *Id.* § 1(3) (former verdict of "guilty but insane" changed to "not guilty by reason of insanity" by The Trial of Lunatics Act, 1883, 46 & 47 Vict. ch. 38); *see infra* note 60.

60. The Trial of Lunatics Act, 1883, 46 & 47 Vict. ch. 38, *reprinted in* 8 HALSBURY'S STATUTES OF ENGLAND 225 (3d ed. 1969) (notes) (where verdict is not guilty by reason of insanity, the defendant is hospitalized); *see also 20/20: New Mother's Nightmare* (ABC televi-

receptive to postpartum illness as a defense to infanticide and has recognized the need for statutory reform.[61]

C. The American Courts and Insanity Defenses

The response of the American legal system to infanticide has been quite different. The law in the United States does not distinguish between homicide and infanticide,[62] and because each state has its own penal code, there are no unified homicide statutes as there are in England. Indeed, "no legislative battles . . . have ever been waged in the U.S. Congress as they were in the British Parliament, and the crime is wholly under the aegis of state homicide statutes."[63]

Most states do recognize a defense of insanity to the charge of homicide.[64] Many jurisdictions have adopted either the *M'Naghten* test[65] or the American Law Institute's Model Penal Code.[66]

---

sion broadcast, Oct. 14, 1988) (transcript available from Journal Graphics, Inc., 267 Broadway, New York, N.Y. 10007) [hereinafter *20/20*].

61. Britain has consistently been receptive to defenses based on female biology. Aside from forms of postpartum depression, premenstrual syndrome has also been successfully asserted as a defense to criminal charges. Note, *Premenstrual Syndrome*, 6 HARV. WOMEN'S L.J. 219, 223 (1983). In France, premenstrual syndrome is grounds for a temporary insanity plea. Gray, *Raging Female Hormones in the Courts*, MACLEANS, June 15, 1981, at 46. In Canada, evidence of hormonal changes in postnatal psychosis is a basis for withdrawing criminal charges. *Id.*

62. *See, e.g.*, MODEL PENAL CODE § 210.0, 10 U.L.A. 120 (1974); N.Y. Penal Law § 125.00 (McKinney 1987). The Code's homicide statutes proscribe killing a human being, "a person who has been born." MODEL PENAL CODE § 119. The New York statute is even clearer. It defines homicide to mean killing "a person or an unborn child with which the female has been pregnant for more than twenty-four weeks." N.Y. PENAL LAW § 125.00 (McKinney 1987). Thus, it expressly excludes abortion but implicitly includes infanticide.

63. R. WEIR, *supra* note 10, at 26 (quoting C. Damme, *Infanticide: Worth of an Infant Under Law*, MEDICAL HISTORY 17 (1978)).

64. 2 P. ROBINSON, *supra* note 5, at § 173(a); *see also* A. GOLDSTEIN, *supra* note 3, at 9.

65. M'Naghten's Case, 8 Eng. Rep. 722 (H.L. 1843).

66. MODEL PENAL CODE § 4.01, 10 U.L.A. 490 (1974).

A few jurisdictions have adopted the *Durham* rule which holds that the defendant is not criminally liable if his unlawful act was the product of mental disease or defect. Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954). This rule has been abandoned in the jurisdiction which created it. United States v. Brawner, 471 F.2d 969, 970 (D.C. Cir. 1972). Other jurisdictions have adopted the "irresistible impulse test," which holds that a defendant should be found not guilty by reason of insanity if he could not control his conduct. A. GOLDSTEIN, *supra* note 3, at 67. The test is used in conjunction with the *M'Naghten* rule. *Id.*

The *Durham* rule and the "irresistible impulse test" are less stringent than the *M'Naghten* rule. To the extent that postpartum psychosis satisfies the *M'Naghten* criteria, it will satisfy the *Durham* and irresistible impulse requirements as well. Therefore, the *Durham* rule and the "irresistible impulse test" will not be separately considered in this analysis.

A few jurisdictions, including Idaho, Montana, and Utah, have abolished a general insanity defense altogether, although each state allows some evidence of mental illness to negate an offense element. 2 P. ROBINSON, *supra* note 5, at § 173(a) n.5.

Under the *M'Naghten* test, an insanity defense is established by proving that, at the time of the criminal act, the defendant suffered from a "defect of reason" or "disease of the mind," which rendered her incapable of knowing the "nature and quality" of her acts or that her acts were wrong.[67] Thus, to satisfy the *M'Naghten* test, a postpartum psychosis sufferer must first establish that her illness gave rise to a "defect of reason" or a "disease of the mind." The concept of "disease of the mind" as used in the *M'Naghten* test is narrower than the psychiatric concept of mental disease and generally is limited to disorders such as psychosis, schizophrenia, and paranoia.[68] Since these mental disorders are frequently associated with postpartum psychosis, a defendant who showed she suffered from this illness would meet the "disease of the mind" requirement. Defense counsel then would have to prove that the illness actually "rendered her incapable of knowing the nature and quality of her acts or that they were wrong." Diseases which manifest themselves as hallucinations result in one not understanding the physical nature of one's conduct.[69] Diseases which manifest themselves as delusions result in one not understanding the consequences that the act may cause.[70] Since postpartum psychosis is often characterized by hallucinations and delusions,[71] even under a strict interpretation of this

---

While the U.S. Supreme Court has not decided whether abolishing the insanity defense is unconstitutional, it has recognized the significance of the defense. *Id.* (West Supp. 1988-89). *See* Ake v. Oklahoma, 470 U.S. 68 (1985) (Court held that due process requires that an indigent defendant be entitled to the assistance of a psychiatrist).

67. *M'Naghten*, 8 Eng. Rep. at 722.

68. A. GOLDSTEIN, *supra* note 3, at 47-48. "[O]nly a limited number of psychoses and the most extreme forms of mental defect can qualify . . . ." *Id.* at 47. "[N]on-psychotic illness cannot qualify." *Id.* at 48 (footnote omitted).

69. P. ROBINSON, *supra* note 5, at § 173(c)(1).

> Disabilities That Cause - Hallucination and Delusion. A, a hallucinating paranoid schizophrenic, chops off X's head because A sees it as a block of wood. B, suffering from the same mental disease, chops off X's head while X is sleeping, because B thinks that it will be fun to watch X look for his head when he wakes up. A's disease has manifested itself in a *hallucination*; and as a result he does not understand the physical nature of his conduct. B's illness has caused a *delusion*; he understands the physical nature of his conduct — chopping off a head — but does not understand that the removal of his victims' head will result in death. His delusion causes him to believe instead that the victim will arise and look for his head. Hallucination and delusion are both perceptual errors: the former an error in the collection of sensory data, the latter a defect or malfunction in the cognitive interpretation of data. *The defects of A and B are of an equally gross nature and both merit exculpation as long as the hallucination or delusion accounts for the criminal conduct.*

Id. (emphasis added) (footnotes omitted).

70. *Id.*

71. *Id.*

rule, in which only the most severely psychotic individuals can meet the requirement of an "inability to know the nature of the act or that it was wrong," postpartum psychosis sufferers should satisfy the *M'Naghten* test.

In comparison, the Model Penal Code exculpates a person who, at the time of the criminal act, due to "mental disease or defect lack[ed] substantial capacity either to appreciate the criminality (wrongfulness) of her conduct or to conform her conduct to the requirements of law."[72] Because the Code ameliorates many of the harsh *M'Naghten* requirements, an insanity defense based on postpartum psychosis is more likely to succeed in jurisdictions adopting the Model Penal Code.

Under the Model Penal Code, while a postpartum psychosis sufferer needs only a substantial incapacity to appreciate her criminality or to conform her behavior, under *M'Naghten*, a total cognitive or behavioral incapacity is required.[73] Further, under the Model Penal Code, because she is required to show only that she did not "appreciate" the wrongfulness of her act, her emotional as well as her intellectual state are relevant. However, under *M'Naghten*, only her intellectual state is relevant since the criterion is that she must "know."[74] Therefore, to the extent that postpartum psychosis causes an individual to lack the substantial capacity to appreciate the criminality or wrongfulness of her act, or to conform her conduct to the requirements of law, postpartum psychosis establishes a defense of insanity under the Code.

Notwithstanding the ease by which postpartum psychosis seems to satisfy the requisites of the major insanity defenses, women asserting the defense are being convicted and sent to jail.[75] It appears that

---

72. MODEL PENAL CODE § 4.01(1), 10 U.L.A. 490 (1974). The Code's definition of insanity excludes mental diseases or defects manifested only by "repeated criminal or otherwise antisocial behavior." *Id.* § 4.01(2). "The mental illness classification of 'psychopath' or 'sociopath,' as this is called, merely explains that the offender is abnormal because he engages in criminal conduct." 2 P. ROBINSON, *supra* note 5, § 173(b)(2). Postpartum psychosis does not constitute psychopathology or sociopathology; *see id.* § 173(b) n.13; *see also supra* note 4 and accompanying text.

73. *See* A. GOLDSTEIN, *supra* note 3, at 87.

74. *Id.* By substituting "appreciate" for "know," the Model Penal Code test "indicat[es] a Model Penal Code preference for the view that a sane offender must be emotionally as well as intellectually aware of the significance of his conduct." *Id.*

75. *See infra* notes 92-110 and accompanying text. In theory, postpartum psychosis should satisfy the *M'Naghten* and Code requirements for insanity. Practice, of course, differs. In one case, under the *M'Naghten* test, the Supreme Court of Nevada affirmed the attempted murder conviction of a woman suffering from postpartum psychosis. The court stated, "[T]he issue was a jury question, and the jury . . . had a right to disbelieve the . . . witnesses . . . ." Clark v. State, 95 Nev. 24, 27, 588 P.2d 1027, 1030 (1979).

while medical recognition of a disorder is necessary for the insanity defense, it is not, by itself, sufficient.[76] The excuse is successful only if psychiatric testimony convinces the jury that, as a result of the defendant's illness, she is distinguishable from a criminal personality and, thus, is not culpable.[77] Yet juries are not readily convinced because the general public lacks the understanding of both the severity of the illness and the nature of its symptoms. Such ignorance and skepticism within the community compounds the problems of postpartum defendants and penalizes them when they should be excused.

II. THE POSTPARTUM DEFENSE IN AMERICAN COURTS

The application of the postpartum psychosis defense in United States cases illustrates the need for uniformity because, under present law, similar facts and circumstances are producing diverse results.

Angela Thompson[78] admitted drowning her son in 1983 after hallucinating that her child was the devil and that God had instructed her to destroy him.[79] She submitted the issue of postpartum psychosis to the Yolo County (California) Court[80] and spent several months in a mental hospital.[81]

In 1987, Michele Remington attempted suicide after fatally shooting her infant son with a handgun.[82] Ms. Remington asserted the postpartum defense, received a favorable determination from a Vermont Court, and was released.[83]

In September of 1988, a New York Supreme Court jury in Manhattan took just nine hours to find Ann Green "not responsible" for the smothering deaths of her two babies and the attempted suffocation of her third.[84] Ms. Green told the jury that the babies had been crying continuously[85] and that she had seen hands she did not recog-

76. P. ROBINSON, *supra* note 5, at 286 n.10.
77. *Id.*
78. *See supra* notes 29-32 and accompanying text.
79. Toufexis, *supra* note 8, at 81.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. Cox, *supra* note 8, at 24. Ms. Green killed her first baby in 1980, her second in 1982, and attempted to kill her third in 1985. *Id.*
85. At least one study has shown a strong link between difficult infant temperament and the severity of postpartum depression. Cutrona and Troutman, *Social Support, Infant Temperament, and Parenting Self-Efficacy: A Mediational Model of Postpartum Depression*, 57

nize holding pillows over the newborns' faces.[86] She initially fabricated a story, but later confessed to her husband.[87] Following a verdict in Ms. Green's favor, she was ordered to have a psychiatric evaluation as an outpatient.[88]

In 1986, Beverly Bartek of Lincoln, Nebraska, drowned her infant daughter in the kitchen sink.[89] Two days earlier, her physician had informed her that the moodiness and paranoia she was experiencing were the results of the "baby blues."[90] Ms. Bartek asserted the postpartum defense and was released.[91]

While these cases represent a growing acceptance of an insanity defense based on postpartum psychosis, many courts and juries remain unconvinced of the causal connection between the mother's illness and her infant's death. Other cases illustrate not only the inconsistency of verdicts in postpartum cases, but the disparate sentences imposed on convicted mothers as well.

Kathleen Householder of Rippon, West Virginia, hit her two-week-old daughter in the head with a fist-size rock because the baby was "fussing."[92] Ms. Householder then threw the body in a river.[93] After disclosing a complex kidnapping story to the police, she spent twenty-two months in jail.[94]

After more than a week of deliberation, a jury in Santa Ana, California, found Sheryl Lynn Massip guilty of murdering her six-week-old son.[95] During the seven-week trial, Ms. Massip's father testified that after she gave birth, Ms. Massip had "Little Orphan Annie eyes, round and empty."[96] Ms. Massip took the stand to say that, "on the day her colicky firstborn died, she heard voices commanding her to put him out of his misery."[97] She recalled only "blurry snapshots"[98] of the incident:

CHILD DEVELOPMENT 1507, 1515 (1986). Many women who kill their babies while suffering from postpartum psychosis report that their babies had difficult temperaments; *see, e.g., infra* notes 92, 97, 112 and accompanying text.

86. Cox, *supra* note 8, at 24.
87. *Id.*
88. *Id.*
89. Toufexis, *supra* note 8, at 83.
90. *Id.*
91. *Id.*
92. *Id.* at 81.
93. *Id.*
94. *Id.* at 83.
95. Cox, *supra* note 8, at 3, 24.
96. Moss, *Postpartum Psychosis Defense*, A.B.A. J. 22 (Aug. 1988) [hereinafter Moss I].
97. Cox, *supra* note 8, at 24.
98. *Id.*

> throwing the baby in front of a car that swerved and missed him, taking him to a garage where she hit him on the head, putting what seemed like a doll face up under the left front tire of the family's Volvo station wagon and running over it, throwing a corpse in the trash.[99]

Ms. Massip initially told police that the infant had been kidnapped, but later confessed to her husband.[100] The jury returned a verdict of guilty in November, 1988, but Superior Court Judge Robert R. Fitzgerald overturned the second-degree murder conviction and acquitted Ms. Massip on grounds of temporary insanity.[101]

On January 3, 1985, Sharon Comitz dropped her one-month-old son from a bridge into a mountain stream.[102] She first told police that her son had been kidnapped from her car while it was parked at a shopping center.[103] Weeks later, the police uncovered evidence implicating Ms. Comitz in her son's death and charged her with both first- and third-degree murder.[104] She passed two lie detector tests indicating that she completely believed her own story. Only under hypnosis did she recall the truth.[105] After an unsuccessful appeal to the Superior Court of Pennsylvania, she was sentenced to jail for eight to twenty years.[106] While the appellate court acknowledged that she suffered a dissociative reaction caused by the birth of her child, it agreed with the trial court that her "mental condition did not constitute substantial grounds tending to excuse her conduct."[107] The appellate court also agreed with the trial court's rejection of probation for Ms. Comitz.[108] Despite scientific material presented at both proceedings that a recurrence of her dissociative reaction was improbable, particularly since she had undergone tubal ligation,[109]

---

99. *Id.*

100. *Id.*

101. Moss, *Postpartum*, A.B.A. J. 40 (Feb. 1989).

102. *Id.*

103. Commonwealth v. Comitz, 365 Pa. Super. 599, 601, 530 A.2d 473, 474 (1987).

104. *Id.* at 602, 530 A.2d at 474.

105. *Id.; see also infra* notes 125-131 and accompanying text.

106. *Id.* at 602, 530 A.2d at 474.

107. *Id.* at 610, 530 A.2d at 478. Ms. Comitz had suffered postpartum depression after her first child was born and was hospitalized then for psychiatric treatment. She also had suffered severe depression during her pregnancy with the baby she later killed. *Id.* at 602-03, 530 A.2d at 474.

108. *Id.* at 608, 530 A.2d at 478. In lieu of confinement, state law permits a severely disturbed offender to be placed on probation with the stipulation that she receive treatment. *Id.* at 477-78.

109. *Id.* at 612, 530 A.2d at 479.

the court believed she represented a "future undue risk . . . as a result of her mental illness."[110]

The fates of two other women have not been decided at this time. The conflicting verdicts previously discussed offer little guidance in predicting their outcomes. A Brooklyn housewife, Lucrezia Gentile, reported the abduction of her two-month-old son in April, 1988.[111] Later, she confessed that because of his constant crying she drowned him in his bath.[112] Ms. Gentile, who paid $20,000 to correct an infertility problem in order to conceive her baby, was described by her defense attorney, John DePaola, as a "perfect mother to her other child."[113]

Lorenza Penguelly, of San Diego, California, is charged with murdering her five-month-old daughter by dropping her off a pier.[114] Two weeks after returning home from the hospital with her newborn, Ms. Penguelly began having thoughts of "pushing her daughter off an escalator" and "pouring hot water on the infant and cooking her."[115] She was hospitalized and treated for the illness but, after being released, found herself unable to control her thoughts.[116] She eventually drowned the infant after hallucinating that her daughter was a rat.[117]

The disparate verdicts in these cases indicate that, as a legal defense, insanity as a result of postpartum mental illness is a courtroom gamble. According to Michael Dowd, Ann Green's defense attorney, postpartum cases depend largely on expert psychiatric testimony, without which a jury would be unable to determine whether the mother possessed the "capacity to appreciate the nature of her act."[118] Some defense attorneys are, in practice, unwilling to

---

110. Mr. Comitz subsequently appeared before the State Board of Pardons to request Sharon's release. The Board denied her husband's plea to commute Ms. Comitz's eight-to-twenty year sentence, although they agreed to reduce it to six years. One month later, the Board reversed its decision and reinstated the eight-to-twenty year sentence. *Postpartum: Beyond the Blues* (Lifetime television broadcast, Mar. 22, 1989).

111. Toufexis, *supra* note 8, at 81; *see also* Moss I, *supra* note 96, at 22.

112. Toufexis, *supra* note 8, at 81.

113. Moss I, *supra* note 96, at 22.

114. Cox, *supra* note 8, at 3.

115. *20/20, supra* note 60.

116. *Id.*

117. *Id.* She had checked herself into a hospital for medical treatment shortly after her daughter's birth. When the Department of Social Services allowed her to return home, she took the life of her youngest child. *Id.*

118. Telephone interview with Michael Dowd, defense attorney for Ann Green (Oct. 23, 1988).

risk an "all-or-nothing" defense.[119] Because skeptical juries are likely to return a murder conviction rather than to acquit, pleading to a lesser charge can be an inviting alternative. Christopher J. Plourd, Ms. Penguelly's defense attorney, speculates that a claim of postpartum psychosis can be useful to "lessen a murder charge."[120] Plourd "doubts there will ever be a time when a sufferer can count on being accepted as the legal equivalent of, say, a sleepwalker whose unconsciousness confers innocence."[121] Ironically, the prosecutor in the Penguelly case, Harry Elias, recognizes the potential of a postpartum depression defense for "negating a murder charge."[122] He acknowledges that Ms. Penguelly, who started psychiatric treatment after the 1984 birth of her first child, may well suffer from a severe form of the disorder.[123] Notwithstanding this belief, Mr. Elias is pursuing a first-degree murder charge because "the role the illness played in this case is best left up to a jury."[124]

Another obstacle that postpartum defendants face is that prosecutors, and often jurors as well, view elaborate fabrications and cover-up stories as proof that the women are rational.[125] District Attorney Ray Gricar, who handled the Comitz case, commented: "Obviously, Sharon was depressed and 'lost it,' but there's no way she was out of her mind. She had to know exactly what she was doing and had a clear head to do it."[126] Criminologist Daniel Katkin of Pennsylvania State University disagrees.[127] According to Katkin, it is a mistake to believe that insane people are incapable of making plans, inventing excuses, or fabricating stories.[128] "The reality is that crazy people also make plans, but they make crazy plans."[129] Peter Goldberger, a Philadelphia attorney who has worked on postpartum cases, explains that, when women with postpartum psychosis are in a dissociated

---

119. Milton Grimes, Ms. Massip's attorney, and John DePaola, Ms. Gentile's attorney, Moss I, *supra* note 96, at 22, as well as Christopher Plourd, Ms. Penguelly's attorney, Cox, *supra* note 8, at 3, all expressed apprehension about using the Postpartum Defense because of juries' potential sympathies for the children and the general skepticism about the illness.

120. Cox, *supra* note 8, at 3.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Toufexis, *supra* note 8, at 83.

126. *Id.*

127. *Id.* Katkin believes that stories of kidnapping do not indicate sanity; Moss I, *supra* note 96, at 22.

128. Toufexis, *supra* note 8, at 83; Moss I, supra note 96, at 22.

129. *Id.*

state, "thought is separated from feeling . . . and [d]etails are forgotten"[130] and may only be recalled under hypnosis.[131]

Thus, there are numerous problems facing a defendant who asserts the postpartum defense. Inconsistent dispositions discourage attorneys who consider using the defense and present problems of fairness for their clients.[132] Juries are uncomfortable about excusing the murder of a defenseless, innocent child, particularly when it is committed by the child's own mother. Even when the illness is presented as a psychotic dissociative disorder, juries are unwilling to believe that it constitutes adequate grounds to excuse a defendant's conduct.[133]

While verdicts in criminal cases will always differ depending on the facts and evidence presented at trial, verdicts in postpartum cases are not easily reconcilable on these grounds. Indeed, the hallucinations and delusions that accompany the illness are of such an extreme nature that the women in these cases merit exculpation.[134] According to Katkin, "it looks increasingly as if all that matters is who are the triers of fact."[135] Although "juries tend to get swept away with sympathy for the mother or the baby,"[136] the question of legal culpability is not, and should not be, one of sympathy. The question is, and must be, whether the defendant appreciated the nature of her act or knew that it was wrong. To the extent that the mother was in a psychotic state, that answer can only be "no."

III. ALTERNATIVES FOR REFORM

The key to preventing these tragedies lies in the education of both the public and health-care professionals. Too often, a woman's postpartum problems go undetected. Women leave hospitals within three days of delivery, before most serious postpartum difficulties arise.[137] Husbands and doctors frequently fail to appreciate the gravity of the

130. Moss I, *supra* note 96, at 22.

131. *Id.*

132. Cox, *supra* note 8, at 24.

133. *Id.* at 3, 24; *see also supra* notes 92-110 and accompanying text.

134. 2 P. ROBINSON, *supra* note 5, at § 173(c)(1).

135. Cox, *supra* note 8, at 24.

136. *Id.* (quoting statement by Peter Goldberger, attorney and former professor, Whittier College School of Law).

137. MERCK, *supra* note 6, at 1788. While "baby blues" or mild depression may begin as early as twenty-four hours after delivery, *id.*, or as late as a few weeks later, S. ALADJEM, *supra* note 13, at 414, when it lasts longer than seventy-two hours, it is considered a serious medical condition requiring treatment; *see* MERCK, *supra* note 6, at 1788; S. ALADJEM, *supra*, note 13, at 424.

illness.[138] In fact, many doctors still mistakenly believe that postpartum depression is merely psychological.[139] Some mothers are afraid to talk about their problems, and, when they do, physicians and families often discourage them.[140]

Yet, postpartum psychosis can be diagnosed and prevented[141] if treatment is sought and made available to the patient. But prevention is unlikely if people continue to view the illness skeptically and regard the problem as merely "baby blues" or as purely "psychological." Education of health-care professionals and the public is crucial, but it is not enough.

Some tragedies will inevitably occur, including suicide attempts, which may appear to be the only way a mother can resist acting on her hallucinations and delusions.[142] Other mothers, however, may act on these thoughts and kill their infants.[143] Compounding their tragedies, those mothers may have to defend themselves against criminal charges of manslaughter or murder. While education and medical treatment are important preventive measures, it is equally important that postpartum sufferers be treated with fairness and justice in the courts.

The basic problem warranting legal response is that women who suffer from postpartum psychosis and commit infanticide do not possess the *mens rea* required for criminal culpability.[144] Nevertheless, they are often convicted and given jail sentences.[145] This is contrary to the fundamental principal of criminal law that one who commits an involuntary or unknowing act cannot be held culpable for that act.[146]

---

138. For example, when pregnant with her second child, Angela Thompson feared a recurrence of postpartum psychosis. Her physician told her not to worry, it was not likely to recur. Toufexis, *supra* note 8, at 81. Beverly Bartek's fears were allayed when her doctor told her that her paranoia was only a result of "baby blues." *Id.* at 83. Two days later, she killed her baby. *Id.*

139. *Postpartum Blues*, *supra* note 6, at 105.

140. *Id.* at 107. After complaining about depression or initial symptoms of possible psychosis to her physician, the doctor may give a new mother a physical, only to tell her that she is healthy and send her home. *Id.*

141. Experts have suggested various methods of preventing severe postpartum depression or psychosis, including progesterone, vitamins, and estrogen. *Id. See supra* note 28.

142. *See* MERCK, *supra* note 6, at 1788; A. KREUTNER, *supra* note 12, at 185-86.

143. *See supra* notes 78-117 and accompanying text.

144. *See supra* notes 67-74 and accompanying text.

145. *See supra* notes 92-110 and accompanying text.

146. 2 P. ROBINSON, *supra* note 5, at § 171(1); MODEL PENAL CODE § 2.01(1), 10 U.L.A. 464 (1974); N.Y. PENAL LAW §§ 15.00, 15.05 (McKinney 1987 & Supp. 1989); *see also supra* note 1.

By punishing a postpartum defendant, the law fails to recognize that her alleged crime is a result of her illness. Postpartum psychosis causes major distortions of reality[147] which can vitiate consciousness and make judgment unreliable. These distortions essentially negate the issues of voluntariness and knowledge. Absent the illness, the new mother would not have killed her child; because of the illness, she was compelled to do so. Therefore, imprisoning these women undermines the integrity and fairness of the law and deprives defendants of their fundamental rights.[148] Only legislative response can remedy this injustice.

One alternative is presented in England's Infanticide Act of 1938.[149] While not an ideal solution, it does provide an approach for reform. The statute establishes a specific crime of infanticide, separate from that of murder, thus recognizing its unusual nature.[150] Further, it expressly acknowledges postpartum psychosis as a mitigating factor against culpability.[151] It requires that, notwithstanding that the circumstances of the crime appear to warrant a murder conviction, if postpartum psychosis is proved, a defendant cannot be convicted of murder. Instead, the lesser charge of infanticide must be found.[152] This approach serves both legal and social purposes to

147. DSM III, *supra* note 4, at 367 (especially delusions, hallucinations, and paranoia).

148. The failure to excuse postpartum psychosis sufferers from criminal culpability arguably denies them equal protection. U.S. CONST. amend. XIV, § 1. The law provides that "conduct during hypnosis," MODEL PENAL CODE § 2.01(1)(c), 10 U.L.A. 464 (1974), or an epileptic seizure, *see e.g.*, Oborn v. State, 143 Wisc. 249, 126 N.W. 737 (1910), is a complete excuse to criminal culpability because such conduct is involuntary and unknowing. *See, e.g.*, MODEL PENAL CODE § 2.01. Postpartum psychosis sufferers share this characteristic. In all three cases, the actor neither consciously chooses to act nor consciously knows the nature of her conduct. Thus, to exculpate those who are hypnotized or epileptic, but not those suffering with postpartum psychosis, raises the issue of treating postpartum psychosis sufferers differently for what appears to be no rational basis.

Conviction and incarceration of postpartum psychosis defendants also implicates the right to an impartial jury, U.S. CONST. amends. V, VI, and XIV, and the prohibition against cruel and unusual punishment, U.S. CONST. amends. VIII and XIV. If jurors convict because of their own skepticism or disbelief, rather than on the merits, then the verdict is tainted; *see, e.g.*, BLACK'S LAW DICTIONARY 378 (5th ed. 1979). Incarceration of these women is cruel and unusual because it punishes and jails them for conduct they could not control; *see, e.g.*, Jackson v. Indiana, 406 U.S. 715, 718 (1972).

Finally, incarceration of these women offends due process; U.S. CONST. amend. XIV. It is fundamentally unfair to punish women for acts committed involuntarily and unknowingly because of an illness, rather than treating them; *see, e.g., Jackson* 406 U.S. at 718.

149. The Infanticide Act, 1938, 1 & 2 Geo. 6, ch. 36, *reprinted in* 8 HALSBURY'S STATUTES OF ENGLAND 334 (3d ed. 1969).

150. *Id.* § 2.

151. *Id.* §§ 1, 2.

152. *Id.* § 1 (felony infanticide is treated as a form of manslaughter). The jury may also return a verdict of not guilty by reason of insanity, or manslaughter. *Id.* § 3.

the extent that it deters the crime of infanticide while it recognizes that postpartum psychosis might be the cause.

One criticism of this approach concerns the provision allowing a jury to return a verdict of manslaughter *or* a verdict of not guilty by reason of insanity.[153] Such alternative verdicts present contradictory information to the jury. On one hand, the option of acquittal tells the jury that postpartum psychosis is a valid defense to infant murder and is a recognized excusing condition in the eyes of the law. On the other hand, the option of a manslaughter verdict indicates to the jury that a postpartum psychosis sufferer *could* possess the requisite criminal intent to commit the act, despite the presence of the excusing condition. Thus, given an already skeptical view of the illness and sympathy for the baby, once a jury perceives that criminal intent may have existed, it is likely they will return a verdict of manslaughter, rather than not guilty. Any legislation, therefore, which includes both verdicts, might confuse the jury and steer it away from acquittal.

Yet, the absence of a manslaughter provision would be problematic as well since the jury would be faced with the choice of an acquittal or a murder conviction. Until the public is educated to, and fully accepts, the reality of postpartum psychosis, jurors may not feel comfortable or justified in returning a verdict of not guilty by reason of insanity. Absent the manslaughter provision, the jury may feel compelled to return a verdict of murder, resulting in the maximum sentence being imposed on the defendant.[154] So long as postpartum psychosis continues to be regarded with ignorance and disbelief, this statute is an inappropriate solution because it only tends to confuse the jury even more as to the merits of the defense.

A more appropriate alternative addresses this fundamental problem directly. Postpartum psychosis should be made a statutory affirmative defense to infanticide,[155] wherein a proved case of postpartum psychosis at the time of the act would require acquittal on the grounds that no *mens rea* could exist and, therefore, no criminal liability could exist. Under this alternative, women would not be wrongly convicted for acts they did not knowingly or voluntarily commit.

---

153. *Id.* §§ 2, 3.

154. For example, under New York law, murder is a class A felony carrying a sentence of life imprisonment. N.Y. PENAL LAW § 70.00 (McKinney 1987 & Supp. 1989).

155. In criminal cases, affirmative defenses commonly include insanity, intoxication, self-defense, automatism, coercion, alibi, and duress. BLACK'S LAW DICTIONARY 55 (5th ed. 1981).

It is possible to clearly define the elements of a postpartum psychosis affirmative defense because the illness has identifiable characteristics. A defendant could be required to prove that she suffered from postpartum psychosis (i.e., that childbirth caused physiological changes which led to psychotic, schizophrenic, and/or cognitive disorders) at the time of the act, which resulted in her taking, or attempting to take, the life of her child. By meeting these criteria, the defendant will show that, as a result of her illness, she was unable to know or appreciate the nature and consequences of her conduct. The burden would be on the defendant to prove the defense by a preponderance of the evidence.[156] If she could meet this burden, she would be acquitted. However, the court could, after a hearing, commit her for hospitalization and treatment if it found she was still suffering from the disease.[157]

One objection to this alternative is that a separate affirmative defense for postpartum psychosis may be unnecessary, and, instead, it should remain under a general insanity defense like other mental diseases. While it is true that proof of suffering from the illness legally should satisfy even the strict requirements of *M'Naghten*,[158] it is clear from the cases that, for non-legal reasons (e.g., juror ignorance or skepticism about the illness), such proof is not sufficient.[159] The problem manifests itself in the imposition of proving both the mental disease or defect requirement in addition to the lack of knowledge requirement. To do so, the defendant must first demonstrate that postpartum psychosis is a real and severe form of mental illness with a physiological basis and not simply "baby blues" or a mere "psychological problem." Only then can she attempt to prove that her defect caused her not to appreciate or know the nature or criminality of her conduct and that it was wrong.

This requirement is unnecessary in postpartum cases since the inability of a postpartum defendant to know or appreciate the nature of her conduct is an inherent aspect of the illness itself.[160] Such inability negates the presence of *mens rea*, without which there can be

156. 2 P. ROBINSON, *supra* note 5, at §§ 3, 5. This is the usual burden of proof for affirmative defenses in criminal cases; *see, e.g.*, N.Y. PENAL LAW § 25.00(2) (McKinney 1987).

157. This is a common procedure after a verdict of not guilty by reason of insanity or mental disease; *see, e.g.*, N.Y. CRIM. PROC. § 330.20 (McKinney 1983 & Supp. 1989).

158. M'Naghten's Case, 8 Eng. Rep. 722 (H.L. 1843); *see supra* notes 67-71 and accompanying text.

159. *See supra* notes 118-124 and accompanying text.

160. *See supra* notes 69-71 and accompanying text.

no culpability. Thus, proving that she suffered from postpartum psychosis at the time of her act is sufficient to warrant acquittal.

Additionally, the requirement of proving lack of knowledge is unduly burdensome in postpartum cases. While the mother may be able to satisfy the mental disease requirement, she may be unable to meet the lack of knowledge requirement simply because jurors and judges are often reluctant to accept the causal connection between the illness and her conduct.[161] Accordingly, she will not meet both criteria of the general insanity defense, and she will be convicted.[162]

By providing a specific affirmative defense, the added burden on these defendants is removed, and fairness as well as due process is promoted. There are other benefits to this approach as well. It reduces the risk that jurors might disregard or discount evidence of the illness since the separate defense indicates that the law takes postpartum psychosis seriously. Further, this alternative is consistent with the goals of criminal justice in terms of deterrence, retribution, and rehabilitation.[163] It preserves the need for trial and conviction of those who intentionally commit infanticide, thereby maintaining a deterrent effect. It provides retribution in the form of punishment for those convicted, while refusing to exact revenge against those who are not blameworthy. And it allows for "rehabilitation" through medical treatment, rather than imprisonment, which is inappropriate for women who are otherwise not criminal offenders.

Clearly, this approach eliminates the obstacles presented in postpartum cases by addressing the underlying problems of ignorance, skepticism, and inadequacies in the law. It is the only means by which to prevent unjust convictions and provide due process to postpartum defendants.[164]

---

161. *See, e.g., supra* notes 92-110 and accompanying text.

162. This is not necessarily an argument which applies to all those who suffer from any psychosis. There is a rational basis for distinguishing postpartum psychosis from other psychoses. Postpartum psychosis results from a physiological condition; DSM III, *supra* note 4, at 367. Other psychotic conditions do not necessarily result from physiological causes; *id.* However, insofar as a psychotic condition does result from demonstrable physiological causes, this argument might be applicable.

163. *See, e.g.*, MODEL PENAL CODE § 1.02, 10 U.L.A. 451-52 (1974); N.Y. PENAL LAW § 1.05 (McKinney 1987); A. GOLDSTEIN, *supra* note 3, at 11; *see generally* C.L. TEN, CRIME, GUILT, AND PUNISHMENT (1987).

164. In one interesting but unusual case, Littleton v. Good Samaritan Hosp. and Health Center, 1987 WL 11810 (Nos. 9872, 9886) (Ohio App. May 28, 1987), an enlightened court recognized the lack of culpability of a postpartum mother. The Ohio appellate court affirmed the trial court's judgment that the proximate cause of a two-month-old infant's death was the hospital's negligent release of the infant's mother. *Id.* at 1. The mother was admitted because she was suffering from postpartum psychosis. *Id.* at 3. Although her psychosis remained unresolved, and despite her assertions that she might kill the child, she was nevertheless released.

CONCLUSION

Increased media coverage and recently publicized cases have drawn considerable attention to the problem of postpartum psychosis; but publicity is not enough. Education is crucial if we hope to eradicate the incidence of infanticide by making clear the seriousness of the illness and the availability of prevention and treatment. An affirmative defense is necessary to rectify deficiencies in the law which unfairly penalize these women and their families, at the very time they suffer a tragic loss. Only through these reforms will postpartum psychosis sufferers be treated with the fairness and justice they deserve.

Barbara E. Rosenberg

Id. at 9. At trial, the court found that there was "a substantial deviation from accepted [medical] treatment" and, as a result, the child's death occurred. *Id.* at 8. The jury returned a $1.8 million verdict for the mother. *Id.* at 1.